Supreme Court, U.S.
FILED
OCT 15 2002
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(3)

No. 02-299

IN THE

Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

REPLY BRIEF IN SUPPORT OF PETITION

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October 15, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF IN SUPPORT OF PETITION

The Louisiana Public Service Commission ("LPSC") acknowledges that the Entergy System Agreement is a FERC tariff and that FERC has jurisdiction to decide whether the tariff has been violated and if so, whether the end result is rates that are unjust, unreasonable, discriminatory, or otherwise excessive. The LPSC now asserts, however, that if FERC has not ruled on the precise issue, the LPSC has jurisdiction to "determin[e] whether a party violated [the] tariff" and to grant Louisiana consumers a lower rate in order to "enforc[e] the requirements of federal law." Opp. 8, 1.

The LPSC is wrong. Under the Federal Power Act ("FPA"), FERC has exclusive jurisdiction to establish and enforce tariffs and issue any remedies for their violation. "[I]f FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co.* v. *Miss. ex rel. Moore*, 487 U.S. 354, 377 (1988) ("*MP&L*") (Scalia, J., concurring). State regulation is preempted, whether FERC has ruled or not. *Id.* at 375. The LPSC has no power to decide that a FERC tariff has been violated, that a FERC rate is unjust or unreasonable, or that Louisiana consumers should receive refunds of FERC rates.

In asserting jurisdiction here, the LPSC relies almost exclusively on cases under the Interstate Commerce Act ("ICA") and the Federal Communications Act ("FCA"). These cases are inapposite. They involve distinct statutory language and regulatory regimes that divide authority between the federal and state governments in a different manner to achieve a different purpose. See *infra* at 6-8. The lone FPA case that the LPSC cites holds that the FPA preempts state regulation that would "impose a rate different from the filed rate." *Gulf States Utils. Co.* v. *Alabama Power Co.*, 824 F.2d 1465, 1470 (5th Cir. 1987). That is precisely what the LPSC and the Louisiana courts did here.

The issue presented by the petition is important and recurring. The LPSC is relying on the decision below to justify asserting authority over the prudence of ELI's payment of other FERC-regulated rates. And, because this decision authorizes state regulators to decide whether rates assessed under FERC rate schedules are excessive, it conflicts with *MP&L* and numerous other decisions of this Court. Like the Fifth Circuit decision it follows, see *New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 911 F.2d 993 (5th Cir. 1990), *cert. dismissed*, 502 U.S. 954 (1991) ("*NOPSI*"), the decision authorizes States to favor their parochial interests over the integrated, multi-state approach that the FPA established. That the LPSC regards the dollar amount at issue as small is beside the point. What is at stake is FERC's exclusive jurisdiction to determine, enforce, and make remedial determinations with respect to wholesale cost allocations and rates – matters of central importance under the FPA that warrant this Court's intervention.

1. The central, erroneous premise of the LPSC's brief is that state regulators may determine whether a utility has violated a FERC tariff and craft a remedy for such a violation. Opp. 1, 7-8. This contention is utterly inconsistent with the FPA and numerous decisions of this Court.

The Entergy System Agreement, including Schedule MSS-1, is a tariff, filed with and approved by FERC. MSS-1 establishes a formula for allocating the costs of reserves among the Agreement's operating companies. Under Section 10.02 of the Agreement, the Entergy Operating Committee determined that ERS units should be included in those costs and the resulting rates. The LPSC asserts jurisdiction to determine that the Entergy Operating Committee misinterpreted MSS-1 and that the result of the claimed tariff misinterpretation is that ELI was assessed excessive rates.

Sections 205 and 206 of the FPA, however, give FERC exclusive jurisdiction to determine just and reasonable wholesale rates and to grant refunds if rates are found to be

unjust, unreasonable, or discriminatory. 16 U.S.C. §§ 824d, 824e. In addition, the FPA specifically authorizes states and municipalities to participate in FERC proceedings and file complaints with FERC. 16 U.S.C. §§ 824d, 824e, 825e. The LPSC agrees that these provisions give FERC jurisdiction to determine whether the rates under the System Agreement are excessive and further that it could have filed a complaint with FERC. Opp. 18, 21. This Court has repeatedly held that "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *MP&L*, 487 U.S. at 377 (Scalia, J., concurring). The LPSC's concession that FERC has jurisdiction to adjudicate and remedy tariff violations should be the end of the matter.

The LPSC, however, insists that unless and until FERC acts, it too has jurisdiction to decide whether a FERC rate schedule has been violated. That argument is inconsistent with the FPA, which admits of no such exception, and with this Court's decisions, most recently *MP&L*.

As here, the tariff at issue in *MP&L* established a formula that determined a rate. The FERC order allocated to MP&L 33% of the costs of the expensive Grand Gulf nuclear plant, but did not specifically find that all the costs of completing the plant and continuing to operate it were just and reasonable. Mississippi asserted that while it lacked jurisdiction to challenge MP&L's 33% allocation, it could determine if the overall amount of Grand Gulf costs and the resulting rates were excessive, because FERC had not specifically addressed the prudence of the completion and continued operation of the Grand Gulf plant. *Id.* at 368.

This Court expressly rejected "the view that the pre-emptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings," saying "[w]e have long rejected this sort of case-by-case analysis of the impact of state regulation upon the national interest' in power regulation cases." *Id.* at 374 (quoting *Nantahala Power & Light Co.* v. *Thornburg*, 476

U.S. 953, 966 (1986) (internal quotations omitted)).[1] It observed that although it did not do so, FERC "easily could have considered" the prudence claims that the State sought to investigate. *Id.* at 375. Thus, the Court held that the State lacked jurisdiction to assess MP&L's prudence and that "the Supremacy Clause compels [Mississippi] to permit MP&L to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power." *Id.* at 373.

Like the Mississippi commission and courts, the LPSC and the Louisiana Supreme Court acknowledge that they lack authority to question the formula for the allocation of costs embodied in MSS-1. They assert, however, that, they can adjudicate the prudence of ELI's "acceptance" of the costs allocated to it under that formula, at least until FERC rules on the question. But, *MP&L* makes plain that this is wrong. The Supremacy Clause compels Louisiana to allow ELI "to recover as a reasonable operating expense costs incurred as the result of" MSS-1, even if FERC has not addressed the prudence of incurring those costs. *Id.* If the State wishes to assert that ELI's acceptance of these underlying costs is imprudent – *e.g.*, because their inclusion both violates the tariff and results in excessive rates – it must complain to FERC.[2] See *id.* at 375 ("[t]he reasonableness of rates and

[1] *See MP&L*, 487 U.S. at 375 ("[t]he question of prudence was not discussed [by FERC or the D.C. Circuit], however, because no party raised the issue, not because it was a matter beyond the scope of FERC's jurisdiction").

[2] Part of respondents' confusion is a failure to recognize that they "can claim no rate as a legal rate that is other than the filed rate, *whether fixed or merely accepted by the Commission*, and not even a court can authorize commerce in the commodity on other terms." *Mont.-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (emphasis supplied). *See id.* at 251-52 ("the right to a reasonable rate is the right to the rate which the Commission *files or fixes*[;] . . . the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one") (emphasis supplied). MSS-1 is the filed rate that States must accept unless FERC finds it unjust or unreasonable.

agreements *regulated by FERC* may not be collaterally attacked in state or federal courts") (emphasis supplied).[3]

The concurrent jurisdiction that the LPSC advocates is also inconsistent with FERC's remedial discretion under the FPA. Once FERC finds a violation of a tariff, FERC alone may determine the appropriate remedy, for it is the single, neutral forum authorized to assure that the wholesale rates and cost allocations affecting such rates are "just, reasonable, and nondiscriminatory." State regulation would set the stage for inconsistent determinations of the meaning of tariffs and of the rates that should result from the operation of tariffs. Indeed, it would allow a State to determine rates by ordering refunds, thus setting a *lower rate* for its own consumers.[4]

This case provides an excellent illustration. FERC found that prior to August 5, 1997, the Operating Committee violated the System Agreement by including ERS units in cost allocations under MSS-1. Pet. 6. FERC determined that by doing so, the Committee achieved significant benefits and cost savings for the system; that "'the end result was just, reasonable, and not unduly discriminatory;'" and that refunds were thus inappropriate. *Id.* at 7-8 (emphasis omitted). FERC also approved the amendment to the System Agreement authorizing the inclusion of ERS units. *Id.* at 8.

Having failed to persuade FERC that the rates that resulted from the inclusion of ERS units were unjust or unreasonable, the LPSC avoided the federal forum and itself litigated the same issue for a subsequent period that FERC did not address. It then condemned the inclusion of ERS units in MSS-1 rates and refused to allow ELI to pass through its

[3] This does not "give preemptive standing to a *breach* of federal law," Opp. 17; it simply requires FERC to resolve any rate-violation complaint.

[4] *See Duke Power Co.* v. *FERC*, 864 F.2d 823, 829 (D.C. Cir. 1989) ("[b]ecause the enforcement of filed rate schedules is a matter distinctly within the Commission's statutory mandate, [FERC] has an independent regulatory duty to remedy a utility's violation of its filed rate schedule") (citations omitted).

required payments, thus "trapping" the costs and lowering Louisiana citizens' rates. Louisiana's refusal to accept FERC's remedial decision arises from an understandable, though forbidden, protection of its parochial interests at the expense of those of other States. FERC has exclusive jurisdiction to prevent this kind of self-dealing by States.

In sum, concurrent federal-state jurisdiction over violations of filed rates and contracts is inconsistent with the FPA and this Court's decisions. This Court should grant the petition to eliminate the conflict and protect the integrity of FERC's jurisdiction and the federal regulatory structure.

2. In support of its argument that state utility commissions have jurisdiction to determine whether FERC tariffs have been violated and to trap costs incurred under these tariffs, the LPSC cites numerous cases arising under the ICA and the FCA. The argument ignores three critical points.

First, the statutory schemes are radically different. Whereas the FPA provides for enforcement solely by FERC, the ICA and the FCA expressly give courts (but not state utility commisions) jurisdiction to adjudicate certain collection and other actions alleging violations of tariffs. The ICA election-of-remedies provision authorizes an aggrieved party to either "make complaint to the [Interstate Commerce] Commission" or bring suit "under the provisions of this chapter in any district court of the United States of competent jurisdiction." 49 U.S.C. § 9 (1970), *quoted in S. Pac. Transp. Co.* v. *San Antonio, Texas*, 748 F.2d 266, 271 n.11 (5th Cir. 1984). Similarly, under the FCA, "[c]ustomers alleging that a carrier has violated a filed tariff . . . may choose to bring their complaints to the FCC *or* to 'any district court of the United States of competent jurisdiction.'" *Brown* v. *MCI Worldcom Network Servs., Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002) (quoting 47 U.S.C. § 207).[5]

[5] *See also Consol. Terminal Sys., Inc.* v. *ITT World Communications, Inc.*, 535 F. Supp. 225, 233 (S.D.N.Y. 1982) (referral to FCC is appropriate where case involves tariff's reasonableness or technical interpretation); *Nat'l Communications Ass'n* v. *AT&T Co.*, 46 F.3d 220, 223 (2d Cir. 1995) (same).

Courts have concluded that in limited circumstances, see *infra* at 8, the ICA and the FCA grant them jurisdiction to enforce ICC and FCC tariffs because, otherwise, the filed-rate doctrine "would render meaningless" the election-of-remedies provisions. *Brown*, 277 F.3d at 1172. By contrast, the FPA contains no election-of-remedies provision, and has *never* been held to permit a court to determine in the first instance if a FERC tariff has been violated.

Second, the differences in the remedial provisions reflect the reality that the FPA effects a very different division of regulatory authority between the federal government and the States than do the ICA and the FCA. The FPA mandates exclusive FERC jurisdiction over wholesale rates and state jurisdiction over retail rates, while the ICA and the FCA provide for federal jurisdiction over carriers' interstate services and state jurisdiction over carriers' intrastate services. See 49 U.S.C. § 10501; 47 U.S.C. §§ 151, 152. Whereas the ICA's and the FCA's authorization of collection and other suits in court poses no substantial potential for the assertion of parochial state interests, a provision that allowed a state commission to adjudicate claims under the FPA and to refuse to pass wholesale costs through in retail rates would allow States to favor their own consumers at the expense of those in other States.

This distinction is evident in the ICA and FCC cases the LPSC cites. Opp. 11-14. These tariff-violation cases are collection actions or contract disputes between carriers and customers. None involves a State attempting to favor its own interests or requires a neutral federal forum. Under the FPA, in contrast, FERC's wholesale rate decisions substantially affect the retail rates of different States' consumers.

Third, even under the ICA/FCA standard for assessing whether a court may adjudicate a tariff violation, a court would lack jurisdiction here. In *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922), this Court held that the ICC has primary jurisdiction when the question is whether shipping rates are just and reasonable, when "the enquiry is essentially one of fact and of discretion in technical matters," and when "administrative discretion" is required. *Id.* at 291, 293-94. Judicial deference to the ICC is not required, however, when the issue is "the meaning of words of the tariff which were used in their ordinary sense" and the application of that meaning to "undisputed facts." *Id.* at 294.[6]

Adjudication of this case requires technical, factual determinations and administrative expertise and thus FERC jurisdiction. The question whether ERS units were "available" within the meaning of the FERC tariff is essentially a matter within the technical discretion of FERC, and FERC alone can determine if the end result of a tariff violation is rates that are unjust and discriminatory. The LPSC's reliance on ICA and FCA cases is badly misplaced.

Finally, the one FPA case that the LPSC cites, *Gulf States Utilities Co.*, conflicts with the decision below. The case addressed other claims that are here irrelevant; and it squarely held that the FPA preempts state regulators from "chang[ing] the filed rate" or "impos[ing] a rate different from the filed rate," as the LPSC and lower courts have done here. 824 F.2d at 1474, 1470. By holding the filed rate unlawful and ordering refunds that FERC plainly would not have ordered, the LPSC has simply changed its own consumers' rates.[7]

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[6] To the same effect, *see S. Pac. Transp. Co.*, 748 F.2d at 272; *United States* v. *Garner*, 134 F. Supp. 16, 18 (E.D.N.C. 1955); *Union Pac. R.R.* v. *Structural Steel & Forge Co.*, 344 P.2d 157, 160 (Utah 1959); *Pa. R.R.* v. *Nasshorn*, 116 N.Y.S.2d 365, 365 (N.Y. App. Div. 1952) (per curiam); *Pa. R. R.* v. *Chromcraft Corp.*, 424 S.W.2d 104, 106 (Mo. Ct. App. 1967).

[7] The LPSC incongruously relies on *Gulf States*' separate holding that federal courts have jurisdiction over other claims that did not challenge a FERC rate (*e.g.*, that a utility failed to negotiate in good faith, that a contract was induced by fraud, and that a utility was selling a *nonaffiliated* utility an improper amount of electricity). 824 F.2d at 1471-72.

3. The LPSC admits that it "could file a complaint and seek relief at the FERC," but contends that "imposing this requirement would unduly burden state regulators" because of the "delay" and "expense of filing and litigating a complaint case in Washington, D.C." Opp. 18. The LPSC does not, and cannot, cite any case or principle of law that supports its assertion that the alleged expense and delay of litigating at FERC trumps the preemptive effect of the FPA.[8]

4. The LPSC also argues that the *Pike County* exception to FERC's exclusive jurisdiction applies. *Id.* at 19 (citing *Pike County Light & Power Co.* v. *Pa. Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983)). The *Pike County* exception allows States to review the prudence of a utility's purchase of power at FERC rates if the utility has "the legal right to refuse to buy that power." *MP&L*, 487 U.S. at 374. Thus, the prudence of a utility's decision to incur costs under FERC rate schedules is subject to state regulation only if the utility can choose whether to obtain the power and incur the costs at issue. Pet. 17, 18, 21 & n.7.

Here, ELI had no choice about whether to incur the costs imposed by MSS-1. That Agreement is a binding FERC rate schedule – *i.e.*, contrary to the LPSC, it is "mandated by FERC" until FERC says otherwise, Opp. 20. As *MP&L* and *Nantahala* make clear, *Pike County* has no application in these circumstances. FERC has exclusive jurisdiction of challenges to arrangements in an integrated power pool.

5. Last, the LPSC argues that the issue presented will not recur and is of small consequence, because only $1 million is involved and because, as Entergy anticipated, all ERS units

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[8] The LPSC suggests that Entergy should have challenged its decision at FERC, Opp. 21; but the filed rate must be enforced until FERC says otherwise. In fact, FERC's exclusive jurisdiction is intended to prevent the duplicative, potentially conflicting litigation that the LPSC suggests.

have returned to active use. It is neither the amount of money nor the particular rate that makes this case important. The critical issue is the preemptive effect of the FPA on state regulation of integrated power systems. Both the decision below and *NOPSI* conflict with decisions of this Court and numerous other federal and state courts. The issue is important and recurring, as evinced by the many cases in which this Court has intervened to preserve the FPA's delineated spheres of federal and state authority. Pet. 13-22.

The need for intervention is bolstered by the fact that the LPSC's success below has already spawned other attempts to subvert FERC's exclusive jurisdiction. In reliance on the decision below, the LPSC is now conducting a proceeding to assess the "prudence" of ELI's bearing costs under other provisions of the System Agreement that the LPSC believes are not just, reasonable, and nondiscriminatory under the FPA. The LPSC did not institute this proceeding to "permit the acquisition of evidence," Opp. 22 – a right it has in FERC proceedings – but because it asserts the authority to order rate reductions if it finds ELI's payments under the FERC tariff to have been imprudent. *Investigation of Retail Issues Related Entergy Sys. Agreement Billings*, No. U-25888, slip op. at 1 (LPSC Jan. 4, 2002). See also Opp. App. E at 21, 22, 27 (instituting another proceeding because of concern that state "authority will be taken away by Federal Preemption").

But the decisive factor is that in this case, the LPSC, emboldened by the Fifth Circuit's *NOPSI* decision, has succumbed to temptation and effectively changed a FERC rate. This Court should act now to prevent this and future infringements on FERC's exclusive jurisdiction by the LPSC and other States.

CONCLUSION

The petition for certiorari should be granted.

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